Assessment Year 1990-91

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

I.T.A. No. 465 of 2001
(Old No. 309/2000)

The Commissioner of Income Tax,
Meerut and another ..... Appellants

Versus

M/s Mc. Dermott International Inc.,
C/o Price Water House, 1102/1107,
Raheja Chambers, Nariman Point, Bombay ..... Respondent

Mr. S.K. Posti, learned Advocate for Income Tax Department.

Hon'ble P.C. Verma, A.C.J.
Hon'ble P.C. Pant, J.

1. This is an appeal under section 260A of the Income Tax, 1961 filed by the Revenue against the judgment and order dated 18.01.2000 passed by the Income Tax Appellate Tribunal, New Delhi in I.T.A. No. 1118/D/94.

2. M/s Mc. Dermott International Inc., respondent is a non-resident foreign company incorporated in Panama. During the year under consideration it was engaged in the business of Deasigning, Fabrication, Construction, Installation of Platform decks, Pipelines, Jackets and various other similar activities for ONGC through its main contractors M/s Sumitomo Heavy Industries Ltd., Burn Standard Co. Ltd., Samsung Ship Bldg, Hundai Heavy Ind. Ltd. ONGC and Nippon K.K. etc.

3. The question raised before us is as follows:-

> "*Whether on the facts and circumstances of the case the learned Income Tax Appellate Tribunal was legally correct to hold that while working out income under sec. 44B.B of the I.T. Act, being special provisions for computing income of foreign Companies engaged in business of exploration of Petroleum product, the addition of tax is to be done once in the beginning only i.e. single stage grossing up and not the multiple stage*

grossing up as done by the Assessing Officer?

4. Heard learned counsel for the parties and perused the record.

5. As this Court has discussed in Income Tax Appeal No. 470 of 2001; the Commissioner of Income Tax, Meerut & another Vs O.N.G.C., Dehradun dated 30th September, 2003, the reasoning regarding this question is given in following paragraphs:

6. The main point, which is required to be decided is whether, the concept of Multiple Stage Grossing up of income is applicable to the deemed profits derived by NRC u/s 44BB of the Act. Whether, that concept can be applied by the Department to compute income falling u/s 44BB of the Income Tax Act? It was argued on behalf of the Department, that in case of Tax Protected Contracts, Sec. 195A was attracted and therefore the Department was entitled to compute the deemed profits derived by the NRC by applying the method of Multiple Stage Grossing up of income. We do not find any merit in this argument of the Department. Firstly, Sec. 44BB is a complete code by itself. It is a charging section as far as the income of the NRC is concerned from oil exploration. It deals with computation of deemed profits. Secondly, Sec. 195A comes under Chapter XVII of the Income Tax Act which deals with collection and recovery of tax whereas Sec. 44BB comes under chapter IV which deals with computation of business income. Therefore, Sec. 195A will not assist the Department in applying the concept of Multiple Stage Grossing up of income to the profits derived by the NRC from oil exploration falling under Sec. 44BB of the Act. Sec. 44BB contemplates computation of deemed profits at 10% of the aggregate receipts received by the NRC from oil exploration. That Sec. 44BB(2) refers to items covered by Gross Receipts. In this case the assessee has computed its income by taking into account the benefit which it has received on account of ONGC paying tax on its behalf. For example, if the assessee has paid tax on Rs. 200/- which is treated as its deemed

profits, the Department has calculated that benefit at Rs.250/- by resorting to Multi Stage Crossing up of Income. This is not the case where the assessee is not paying tax on the benefit of Rs. 200/-. The dispute is only regarding the value of that benefit. According to the assessee the value of that benefit is Rs.200/-, whether one takes the contract to be a Protected contract or whether one takes that contract to be not Protected. In both the cases the value of the benefit will remain constant. Therefore, there is no merit in the case of the Department. Lastly, we may point out that Sec. 195A of the Income Tax Act has no application. it is not a charging section. It provides for recovery of tax. It provides for tax deduction at source. The fact that TDS is deductible u/s 195A from the sum payable does not mean that the contractor is assessable for that receipt. In certain cases, the contractor may not be chargeable to tax in respect of those receipts. For example, in cases where the contractor has carried forward losses or in cases where the contractor suffers losses from other contracts which are liable to be set off. Therefore, the mechanism for recovery of tax mentioned u/s 195A will not make the receipt chargeable to tax. Further, Sec. 195A is confined to incomes falling under Chapter XVII. That Sec. 195A is introduced only for the purposes of TDS. Therefore, that section cannot be applied in support of Multiple Stage Grossing up of income in respect of computation of deemed profits u/s 44BB of the Income Tax Act. In order to illustrate the above examples of the assessee deriving benefit of Rs.200/- computed as per single stage grossing up of income vis-à-vis Multiple Stage Grossing up of income we quote hereinbelow a Statement which illustrates the meaning of “Grossing up of Income”, both Multi Stage and Single Stage.

7. Example of Grossing Up where the tax on the personal income of the non-resident technician is to be borne by ONGC

Say the amount payable to the non-resident technician is Rs.1000 and for the sake of simplicity, the tax rate is 10%

	Stand of ONGC	**I.T. Department's Stand**
Income	1000.00	1000.00
Tax @ 10% on Rs. 1000	100.00	100.00
	1100.00	1100.00
Tax @ 10% on Rs. 100		10.00
		1110.00
Tax @ 10% on Rs. 10		1.00
		1111.00
Tax @ 10% on Rs. 1		0.10
		1111.10
Tax @ 10% on Rs. 0.10		0.01
		1111.11
Tax @ 10% on Rs. 0.01		0.001
Taxable Income	**1100.00**	**1111** (Approx.)
Tax @ 10%	**110.00**	**111.10**

8. For the reasons aforesaid, in para 6 we answer this question in the affirmative i.e. in favour of the assessee and against the Department.

9. Appeal is disposed of accordingly. No order as to costs.

(P.C. Pant, J.) **(P.C. Verma, A.C. J.)**

Dt. 20.07.2004.
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